

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN RE PORK ANTITRUST
LITIGATION

Civil No. 18-1776 (JRT/JFD)

**MOTION FOR LETTERS OF
ROGATORY FOR TYSON
EMPLOYEE SUMIO
MATSUMOTO**

This Document Relates to:

All Actions

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I. INTRODUCTION

Plaintiffs¹ seek the sworn testimony of Sumio Matsumoto, a Tyson employee who helped Tyson reverse engineer Agri Stats reports to identify the defendant competitors' data during the class period. On September 19, 2022, Tyson told Plaintiffs that Mr. Matsumoto lives in Canada, works for a Canadian subsidiary of Tyson, and will not sit for a deposition willingly. Although Tyson exerts control over Mr. Matsumoto and could require him to sit for a deposition as part of his job duties, Tyson is unwilling to do so.²

Plaintiffs met and conferred with Tyson's counsel on September 28 in a final attempt to resolve this dispute without court intervention. As a compromise, Plaintiffs offered to hold the deposition remotely over Zoom, or in a Canadian office at Plaintiffs' expense before the October 31 discovery deadline. Tyson rejected both offers. Thus, Plaintiffs are forced to ask the Court to issue letters rogatory pursuant to Federal Rule of Civil Procedure 28(b) and 28 U.S.C.A. § 1781. Plaintiffs have partnered with local counsel to assist with the transmittal of the letters rogatory to the Canadian courts and ensure compliance with Canadian law.

¹ "Plaintiffs" refers to the Consumer Indirect Purchaser Plaintiffs, the Direct Purchaser Plaintiffs, the Commercial and Institutional Indirect Purchaser Plaintiffs, the Commonwealth of Puerto Rico, and Direct Action Plaintiffs, who bring this motion together.

² During the parties' conference, Tyson did not dispute that it has control over Mr. Matsumoto. Tyson's counsel said that Tyson would not require Mr. Matsumoto to sit for a deposition "or be fired" because they did not believe he held a position with sufficient seniority and suggested his testimony on exports could be obtained by U.S. witnesses. Declaration of Shana Scarlett in Support of Letters Rogatory ("Scarlett Decl.") at ¶ 8.

On September 28, after the conference with Tyson, Plaintiffs called the Court to schedule a hearing for this dispute; the Court indicated it was available on November 16 – two weeks after the close of fact discovery. Tyson said that it will object if this deposition takes place after the close of fact discovery. Yet if Tyson wants certainty that this deposition will take place before the October 31 deadline, it could require Mr. Matsumoto to cooperate as part of his job duties and attend the deposition on a date of Tyson’s choosing. In such instances, under Canadian law, no judicial intervention would be required.³ Since Tyson will not exert its authority over its employee, Mr. Matsumoto’s deposition might take place after the October 31 discovery cutoff, however, Plaintiffs believe that good cause exists for their small exception to the scheduling order.

For the reasons advanced below, Plaintiffs respectfully ask the Court to issue the letters rogatory. And if the Court cannot issue these letters before the close of fact discovery, Plaintiffs request the Court to modify the scheduling order to accommodate the deposition of Mr. Matsumoto.⁴

³ Voluntary depositions taken in Canada do not require prior permission from the Canadian courts and may be taken by private attorneys at the U.S. Embassy or any other location via notice. *See* <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Canada.html>; Meenu T. Sasser, *Discovery In Other States and Countries*, BL FL-CLE 6-1 § 6.3 (10th ed. 2019) (recognizing that “[t]he ‘notice’ procedure is the easiest and most expedient” of the methods for taking depositions in foreign countries).

⁴ Although Tyson will object to Mr. Matsumoto’s deposition taking place after the October 31 cutoff, Plaintiffs and Tyson have agreed to seek an extension of the deadline to accommodate two other Tyson employee deponents – both of whom have scheduling commitments that made securing the dates for a deposition before October 31 challenging. A stipulation regarding an extension to accommodate these depositions is forthcoming.

II. ARGUMENT

Federal Rule of Civil Procedure 28(b) states that a deposition may take place in a foreign country “under a letter of request, whether or not captioned a ‘letter rogatory.’” Fed. R. Civ. P. 28(b)(1)(B). Letters rogatory are how “a court in one country requests a court of another country to assist in the production of evidence located in the foreign country.”⁵ The court has discretion on whether to issue such a letter.⁶ Both the United States and Canada use letters rogatory to depose foreign witnesses.⁷ Courts generally issue letters rogatory “whenever it is determined on a case-by-case basis that their use will facilitate discovery”⁸ Courts “will generally deny an application for issuance of a letter rogatory only upon a showing of good cause by the party opposing issuance.”⁹ Here, Mr. Matsumoto’s testimony meets the threshold for issuing the letters rogatory. Tyson cannot meet its burden of showing good cause in opposition.

⁵ *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 795 F.3d 1255, 1273 (11th Cir. 2015) (citations omitted).

⁶ *Int’l Swimming League, Ltd. v. Fed’n Internationale de Natation*, No. 18-CV-07394-JSC, 2020 WL 7042861, at *2 (N.D. Cal. Dec. 1, 2020) (citations and quotations omitted).

⁷ *See In re DiGiulian*, 314 F. Supp. 3d 1, 4 (D.D.C. 2018) (compelling a American witness to sit for a deposition for a foreign proceeding in Canada); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 777 (S.D.N.Y. 2012) (“the Canada Evidence Act provides that a court outside of Canada may serve letters rogatory upon a Canadian court. . . . This process mirrors the enforcement of letters rogatory by U.S. courts when discovery is sought in the United States for use in litigation before foreign tribunals.”)

⁸ 8 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2005.1 at 70 (3d ed. 2010).

⁹ *Bombardier Recreational Prod., Inc. v. Arctic Cat, Inc.*, No. 12-CV-2706 (MJD/LIB), 2014 WL 10714011, at *6 (D. Minn. Dec. 5, 2014).

A. Only Mr. Matsumoto can explain his process for deanonymizing the Agri Stats reports, and that makes him a critical witness.

From the very first Complaint filed in this case Plaintiffs have alleged the Defendants used Agri Stats to facilitate their price fixing scheme, and “while nominally anonymous, the reports [from Agri Stats] contain such detailed figures covering every aspect of pork production and sales that producers can accurately identify the companies behind the metrics.”¹⁰ In their initial disclosures, Tyson identified only one employee as the person with knowledge of Tyson’s Agri Stats report analysis: Deborah McConnell.¹¹ Critically, Tyson did *not* identify Sumio Matsumoto as a potential source of information on Agri Stats deanonymization, either in its initial disclosures or amended disclosures. Rather, Plaintiffs learned of Mr. Matsumoto’s participation in Tyson’s efforts to deanonymize the reports while preparing for the deposition of Ms. McConnell.

Ms. McConnell’s deposition took place on June 23, 2022.¹² Plaintiffs learned while preparing for Ms. McConnell’s deposition that Tyson learned its competitors’ competitively sensitive data related to profits, pricing, and production monthly by deanonymizing the Agri Stats reports. These efforts were spearheaded by Ms. McConnell each month. During the deposition, Plaintiffs asked Ms. McConnell repeatedly to explain Tyson’s process for deanonymizing the Agri Stats reports.

¹⁰ See Class Action Complaint, ECF No. 1 (June 28, 2018), ¶ 61.

¹¹ See Scarlett Decl. at ¶ 3 (filed concurrently).

¹² See Scarlett Decl., Ex. A (McConnell Tr. at 1).

Ms. McConnell testified one source for her attempts were “Sumio’s estimates.”¹³

Ms. McConnell would send spreadsheets with her best estimate for each packers’ identity to Mr. Matsumoto and ask him “to review the data ‘cause we used it for benchmarking all the time. But to see if – if they had a different estimate for some of the names.”¹⁴

Sometimes, Ms. McConnell and Mr. Matsumoto would meet in person (in the United States) to reverse engineer these Agri Stats reports. For example, on the invitation for one such meeting –called the “Agristats competitor review” meeting – Ms. McConnell wrote:¹⁵

We need to collectively work together...again...
 We were able to define the 3 eastern plants for Sept....and validate it.
 Our selection for the 3 in oct was not as close.....(when we validated)
 For November, using the same criteria (export %, live wt, etc) we are NOT CLOSE AT ALL!!!!
 We need input from retail and processor sales to help with the identification process..
 Please bring your Oct and Nov 'books'that is all you will need....thanks, Debbie
 Noel wants to meet (as a group) on 2.11.10 to review the competitor information....

Thus, Mr. Matsumoto served as a source for deanonymizing the reports and a check on Ms. McConnell’s own deanonymization attempts.

When pressed, Ms. McConnell testified that she did not know Mr. Matsumoto’s method for determining the identity of competitors in the report: “I guess I don’t know

¹³ *Id.* at 56:19-57:27.

¹⁴ *Id.* at 78:12-79:5.

¹⁵ Scarlett Decl., Ex. B (Deposition Exhibit 982).

the source of his guesses, but he gave me guesses to use as some indicator to come up with an estimate” of competitors’ identities in the Agri Stats reports.¹⁶

Ms. McConnell was also cagey about documents that appear to have been authored by Mr. Matsumoto, such as deanonymized Agri Stats export information in a spreadsheet tab titled “Sumio Export competitors.”¹⁷ Questioned about this file, Ms. McConnell stated, “it’s not one of my documents.”

Only Sumio Matsumoto can testify to his process for identifying competitors in the reports and as to whether he authored the spreadsheet tabs Ms. McConnell distanced herself from. Ms. McConnell said that his logic for deanonymizing the reports would include “what he knows and believes from the market, the world, his connections, his thoughts.”¹⁸ But at least some documents suggest that Mr. Matsumoto’s “connections” may have included communications with competitors; in one email, Mr. Matsumoto instructs a connection to “keep monitoring on Smith’s movements and their offer/sales auctions in China” noting that “US should face a big challenge to sell pork due to big supply of hogs. SFD [Smithfield] may dump products with very cheap price to China just to help US inventory.”¹⁹ Critically, Plaintiffs allege that one way pork packers kept pork supply artificially suppressed in the United States (despite not growing all hogs) was by disappearing pork on the export markets – exactly what Mr. Matsumoto describes here.

¹⁶ McConnell Tr. at 74:16 to 75:17.

¹⁷ McConnell Tr. 62:1-64:24.

¹⁸ McConnell Tr. 93:17-94:25.

¹⁹ Scarlett Decl., Ex. C. (TF-P-002357534).

Where Sumio Matsumoto got this information about Smithfield, and whether information such as this allowed him to help Ms. McConnell deanonymize the Agri Stats reports are questions only he can answer.²⁰ For these reasons, the Court should use its discretion to issue the letters rogatory. “Plaintiffs have satisfied the minimal threshold of relevance, for discovery purposes” in seeking to depose Mr. Matsumoto.²¹

B. If the Court cannot issue the letters rogatory before the October 31 deadline, good cause exists to amend the scheduling order.

During the party’s meet and confer process, Plaintiffs warned Tyson that its insistence on the issuance of letters rogatory might delay proceedings and cause Mr. Matsumoto’s deposition to require an amendment of the scheduling order.²² Tyson indicated it would oppose any modification of the scheduling order to accommodate the delays caused by this process.

Tyson bears responsibility for the delay. Under Rule 26, Tyson had a duty to disclose the name and address of each individual likely to have discoverable information.²³ Even though Plaintiffs’ first complaint described how defendants used Agri Stats to identify competitors within the reports and manipulate the market, Tyson

²⁰ Ms. McConnell did not tell Plaintiffs at her deposition that Mr. Matsumoto moved to Canada; Plaintiffs did not learn about Mr. Matsumoto’s transfer to Canada until September 16.

²¹ *In re Potash Antitrust Litig.*, 161 F.R.D. 405, 410 (D. Minn. 1995).

²² Scarlett Decl., ¶ 13.

²³ *See* Fed. R. Civ. P. Rule 26 (1)(A)(i). And because Rule 26(e) requires a party to supplement discovery responses “in a timely manner,” a party’s “failure to disclose in a timely manner is equivalent to a failure to disclose.” *United States v. STABL, Inc.*, 800 F.3d 476, 487 (8th Cir. 2015).

only disclosed one witness as having knowledge of Agri Stats: Deb McConnell. Despite collecting documents and continuing its investigation, Tyson never amended its disclosures to include Mr. Matsumoto. Yet Tyson knew that Mr. Matsumoto attended meetings to deanonymize the plants in Agri Stats reports and “validate” the “identification process.”²⁴ Had Tyson disclosed Mr. Matsumoto and given his address early in the discovery period, Plaintiffs would have known he lived abroad and could have issued the letters rogatory earlier.

Instead, Plaintiffs had to dig through more than one million documents to learn about Mr. Matsumoto’s involvement themselves.²⁵ The depth of Mr. Matsumoto’s involvement was not known to Plaintiffs until Ms. McConnell testified in late July.²⁶ After receiving Ms. McConnell’s deposition transcript and reviewing documents to better understand Mr. Matsumoto’s role, Plaintiffs approached Tyson on September 9, 2022 to schedule the final three Tyson fact witness depositions, including Mr. Matsumoto.²⁷

²⁴ Scarlett Decl., Ex. B (Deposition Exhibit 982).

²⁵ Tyson has produced 1,020,776 documents. Some of these productions have occurred well after the substantial completion deadline – including producing thousands of pages in the week before depositions. *See* Scarlett Decl., ¶ 11 Tyson’s most recent document production took place on September 26, 2022. *Id.*

²⁶ Plaintiffs could not have avoided discovery issues by scheduling depositions earlier, because Tyson was still making significant document productions well after the substantial completion deadline. For example, four days before the first Tyson witness was set to be deposed in April 2022, Tyson produced more than 13,300 documents – 10,000 of these directly mentioned the deponent. *See* Scarlett Decl., ¶ 12 (Gingerich Tr. at 11:21-13:15). Plaintiffs did not get the benefit of reviewing these documents before the deposition. *Id.*

²⁷ Scarlett Decl., ¶ 6. According to the Court’s Order, Plaintiffs were entitled to 10 depositions of Tyson witnesses. *See* Pretrial Scheduling Order, ECF No. 658 (January 26,

Initially, Tyson did not respond regarding Mr. Matsumoto's deposition. Plaintiffs reminded Tyson about the request on September 16, and only then did Tyson disclose that Mr. Matsumoto lived abroad.²⁸ Counsel for Tyson told Plaintiffs that Mr. Matsumoto was now an employee of Hillshire Canada (a Tyson subsidiary), that they represented him, but he would not willingly sit for a deposition.²⁹ The parties met and conferred three days later and upon reaching an impasse, sought a hearing from the Court that same day.³⁰

This may still be resolved before the close of fact discovery; but “[e]ven in the worst-case scenario, the [Court] can address any problems by other means, such as extending the fact discovery cutoff”³¹ for the limited purposes of completing this and any other yet completed depositions. Good cause exists here, where the delay is the result of the defendants' conduct.

III. CONCLUSION

For these reasons, Plaintiffs ask the court to issue the letters rogatory, and if it becomes necessary, order to allow the deposition of Sumio Matsumoto to be taken after the discovery deadline on October 31, 2022.

2021). At the beginning of September, Plaintiffs approached Tyson to schedule the final three Tyson depositions.

²⁸ Scarlett Decl., ¶ 7.

²⁹ Scarlett Decl., ¶¶ 7-8.

³⁰ Scarlett Decl., ¶ 13.

³¹ *Fisher & Paykel Healthcare Ltd. v. Flexicare Inc.*, No. SACV1900835JVSDFMX, 2020 WL 5900155, at *2 (C.D. Cal. Aug. 17, 2020)

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Respectfully submitted,

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